No. 43852-6-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NORTHWEST CASCADE, INC.,

Appellant,

v.

UNIQUE CONSTRUCTION INC; TEMPORAL FUNDING, LLC; WILLIAM REHE; JANE DOE REHE; WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC,

Respondents,

BRIEF OF APPELLANT

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I. INTRODUCTION

This action arose out of Unique Construction, Inc.'s ("Unique") failure to pay Appellant Northwest Cascade Inc. ("NWC") for construction work performed by NWC. After NWC brought suit, Unique's sole shareholders William and Suzanne Rehe ("the Rehes") gutted Unique of its assets. NWC added the Rehes as defendants, and asked the trial court to hold the Rehes ***personally liable*** for the debts of Unique under the equitable doctrine of corporate disregard (aka "veil-piercing"). NWC was aware of one asset transfer by Unique well before trial and added a Uniform Fraudulent Transfer Act ("UFTA") claim against the transferee. However, NWC later learned of another transfer by Unique – valued at more than $200,000 – to a Nevada LLC controlled by the Rehes. With only months left before trial, NWC was unable to join the additional transferee as a defendant.

The parties agreed that the issue of corporate disregard should be tried separately to the bench. NWC's breach of contract and UFTA issues were tried to the jury. A jury found in favor of NWC on all issues. However, the trial court subsequently ruled ***against NWC***, and in favor of the Rehes, on the claim of corporate disregard.

In ruling against NWC on the corporate disregard claim, the trial court by its own admission refused to consider evidence that the Rehes

gutted the corporation of assets after the action had been filed. In addition, the trial court erroneously chose to characterize the Rehes' substantial diversion of cash from the corporation to their personal benefit as mere accounting errors. NWC assigns error to the trial court's findings, conclusions, and rulings regarding the issue of corporate disregard.

Although the Rehes ***failed to segregate their attorney fees*** from the fees of the unsuccessful defendants, the trial court awarded fees to the Rehes that included time spent on the unsuccessful defense of the breach of contract and UFTA claims by the other defendants. NWC also appeals this ruling.

The trial court's ruling on corporate disregard should be reversed, and the case should be remanded with direction to the trial court to enter judgment against the Rehes due to their diversion of funds and post-suit corporate gutting. In addition, the trial court's fee award to the Rehes should be reversed for its failure to provide a tenable basis for the award.

II. ASSIGNMENTS OF ERROR

The trial court erred in issuing Findings of Fact 26, 34 through 39, and Conclusions of Law 5 through 12. CR 1020-1027.

The trial court erred in issuing its Order on Attorney Fees. CR 1019; CR 994-999.

The trial court erred in issuing its Judgment. CR 1028-1031.

Issues Pertaining to Assignment of Error:

A. Before reaching a determination on corporate disregard, is a trial court required to consider evidence that a shareholder stripped a corporation of a valuable asset?

B. Does the diversion of corporate funds and assets by a shareholder to the detriment of a creditor constitute evidence of intentional use of the corporate form to evade a duty?

C. Does a creditor suffer an unjustified loss when the shareholder's corporate abuses have interfered with the creditor's ability to collect a judgment from the corporation?

D. In a request for fees, must a shareholder who successfully defended against a claim of corporate disregard, segregate the fees expended on that claim from the time spent by the same attorney on the unsuccessful defense of the corporation and other defendants on other claims?

E. May a trial court award attorney fees based upon what the successful defendant hypothetically "would have spent" had he had a separate attorney?

F. Is an award of 67% of total defense fees for an issue that occupied only 11% of trial time manifestly unreasonable?

III. STATEMENT OF THE CASE

A. Contract Between Northwest Cascade and Unique

William and Suzanne Rehe are the sole shareholders of Unique Construction, a general contractor; Mr. Rehe is its President. RP 3/14/12 at 32. Mr. Rehe holds both a J.D. and an M.B.A. RP 3/15/12 at 125. In 2004, Mr. Rehe began the development of a 34-lot residential real estate project (the "Rehe Plat") in Tacoma. RP 3/20/12 at 18-19. Unique acted as the general contractor for the Rehe Plat. Ex. 4.

NWC began negotiating with Unique in the summer of 2005 to build the streets, sidewalks, and infrastructure for the Rehe Plat (Ex. 1), and entered into a subcontract with Unique in March, 2006. Ex. 4. In August, 2007, Unique stopped paying NWC's invoices, leaving an unpaid balance of approximately $140,000. See Ex. 5-15. NWC sued Unique in July, 2008. RP 3/20/12 at 46-47.

B. Diversion of Corporate Funds

After Mr. Rehe's deposition revealed evidence of corporate abuses, NWC added the Rehes as defendants to hold them personally liable for Unique's debts under a theory of Corporate Disregard. CP 996; *see also* 10/30/2009 *Order Granting Plaintiff's Motion to Amend* and *First Amended Complaint* (CP 1355-1356; CP1348-1354).

Unique and the Rehes were subsequently ordered to produce all their financial records. Ex. 269. These records established that between July, 2005 and October, 2007 Unique paid over $200,000 on the Rehes' private credit card. Ex. 122. This amount included a minimum of $27,000 worth of readily identifiable personal expenses.[1] Ex. 272 and 273. In the same time frame, the Rehes wrote checks totaling over $20,000 for personal expenses (including medical and utilities bills), all drawn on Unique's corporate accounts. Ex. 273. Between 2006 and 2007, Mr. Rehe wrote and cashed more than $33,000 in checks on Unique's accounts, written to "CASH", and failed to offer any evidence that the money was used for a business purpose. Ex. 273; RP 3/22/12 at 12. Further, the Rehes lived in a residence owned by Unique (the "89th Street Residence") without paying rent, resulting in an uncompensated benefit to the Rehes worth over $96,000. Ex. 273; RP 3/15/12 at 244-246. The Rehes failed to report any of the substantial benefits they received from Unique to the IRS. RP 3/15/12 at 236-37; 253; Ex. 101. Indeed, the personal expenses were apparently treated as corporate expenses, thereby

[1] This included thousands of dollars in expenses for Mr. Rehe's "classic" car; thousands of dollars for Jenny Craig weight loss expenses; thousands of dollars spent on personal expenses from Target; thousands of dollars in medical and dental expenses, and various other expenses. These expenses were treated as business expenses of Unique (thus reducing the corporation's profits), but were never identified as dividends or as benefits to the Rehes on their personal tax returns. RP 3/15/12 at 235-249. Further, the Rehes completely failed to offer any evidence as to whether any of the other personal credit card expenses were valid business expenses.

reducing and ultimately eliminating income to the corporation, without recognizing it as income to the Rehes. All of this is reflected in Finding of Fact 29 at CP 1024.

The value of the Rehes' diversion of corporate funds totals, at a minimum, $177,000. Ex. 273. As Mr. Pederson testified, the amount is almost certainly much higher, given the fact that many of the potential construction-related expenses on the Rehe's personal credit card but paid for by Unique were for the purpose of constructing a personal residence for the Rehes in Gig Harbor ("the Woodhill Residence"). RP 3/14/12 at 46; 3/15/12 at 235-236. Throughout this time (July, 2005 through December, 2008), the Rehes had substantial personal assets, including a stock account worth approximately $600,000 that they could have used to pay for their own personal expenses.[2] RP 3/15/12 at 249; Ex. 114-15. In 2005, 2006, and 2008, Unique posted a loss of more than $26,000. Ex. 85. The corporation's losses increased as time went on.

C. Post-Litigation Asset Stripping

In addition to the evidence establishing a consistent pattern of diversion of corporate funds and assets, NWC also established that at the time this action was filed against Unique, Unique owned two real property

[2] In December, 2008, the Rehes transferred all this stock to the William K and Marion L LLLP ("the LLLP"), in a transfer that the Jury concluded was undertaken with actual intent to hinder, delay, or defraud creditors. CP 408.

assets: a personal residence on 89th Street Court, and a vacant parcel on 38th Avenue[3], both in Gig Harbor. CP 3/14/12 at 34.

On January 20, 2009, six months ***after*** this lawsuit was commenced, Unique transferred the 38th Avenue lot to a trust (controlled by the Rehes) for "estate planning purposes." RP 3/14/12 56-62; Exs 87 and 121. The admitted purpose of the transfer establishes the undeniably personal use of the corporate property. Unique received no consideration for the transfer. RP 3/15/12, 124; Ex. 121. Six months later, on July 29, 2009, Unique transferred the 89th Street Court property to the same trust, again for no consideration. Ex. 89. In December, 2010, the two properties were again transferred, this time to separate Nevada shell companies controlled by William Rehe. RP 3/15/12, p. 101; 124.

NWC discovered the transfer of the 89th Street Residence in time to add a claim under the Uniform Fraudulent Transfer Act ("UFTA") against current owner Sahara Enterprises LLC ("Sahara"). CP 10-20; CP 996; see also 5/13/2011 *Order Extending Preliminary Injunction* (CP 1357-1359). However, Unique's transfer of the 38th Avenue lot (to ultimate recipient Winnemucca Ventures, LLC) was not discovered until several months before trial. Mr. Rehe had lied about this transfer at his

[3] In the Report of Proceedings this is frequently referred to, erroneously, as the "38th ***Street***" property.

deposition,[4] and failed to disclose the identity of the transferee, the value of the property, or the consideration for the transfer (CP 772-773), ***despite a court order compelling Unique to do so***. Ex. 269. By the time NWC discovered the transfer, service on this out-of-state LLC of a separate UFTA claim would have jeopardized the already long-delayed trial date. CP 335. Instead of adding a new party at that late date, NWC proceeded to trial on the theory that transfer of the 38th Avenue Property constituted evidence of asset stripping that further justified corporate disregard. CP 340. The parties agreed that the equitable issue of corporate disregard should be tried separately to the bench.

D. Jury Verdict in Favor of NWC

Attorney Martin Burns appeared on behalf of all defendants, including the Rehes, and ***defended all claims*** brought at trial. In addition, Mr. Burns brought counterclaims on behalf of Unique and Temporal. NWC successfully had these counterclaims dismissed prior to trial. CP 350-353. NWC dismissed insolvent defendant Temporal before trial. CP 405-406.

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[4] Q. What happened to the property?
A. It was transferred to another company to pay bills.
Q. What other company?
A. A Nevada company that I borrowed money from.
CP 735. Mr. Rehe never subsequently claimed that the trust was a "company that [he] borrowed money from."

At trial, the jury rendered a verdict on behalf of NWC on all counts. CP 407-409. NWC was awarded 100% of what it requested on its breach of contract claim against Unique. In addition, the jury found that Unique transferred the 89th Street property in July, 2009 with ***actual intent to hinder, delay, or defraud creditors***[5], and the Rehes transferred personal assets to the LLLP in December, 2008, also with ***actual intent to hinder, delay, or defraud creditors***.[6] The jury rejected all of the Defendants' affirmative defenses.

E. The Trial Court's Ruling on Veil-Piercing

Even with the return of the 89th Street Residence, Unique still lacked sufficient assets to satisfy its judgment to NWC. NWC asked the trial court to find that Rehes had intentionally stripped all the assets from Unique in order to avoid its obligations to NWC, and to enter a judgment that the Rehes were jointly liable (with Unique) for the damages awarded to NWC. The trial court heard evidence outside the presence of the jury on the question of Corporate Disregard.

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[5] This transfer was to intermediate transferee Black Point Management LLC, who later transferred the Residence for no consideration to Sahara.

[6] These findings sufficed to prove that the transfers were voidable under the Uniform Fraudulent Transfer Act. *See* RCW 19.40.041(a)(1). The trial court subsequently voided the transfer of the 89th Street Residence.

NWC consistently argued that the transfer of the 38th Avenue Lot constituted evidence of corporate gutting.[7] In its Third Amended Complaint, in the section on corporate disregard, NWC alleged "William Rehe has caused [Unique]'s assets to be transferred to other entities, without consideration, and has left [Unique] devoid of assets in order to avoid potential liability." CP 16 at ¶ 61. In its trial brief NWC argued,

> Most significantly, Rehe diverted the most valuable assets of Unique – the 35th Street [sic] and 89th Street Court NW properties – to other shell companies he controlled personally, all to the detriment of NWC's ability to recover. ***Mr. Rehe gutted the corporation of its last remaining assets, leaving it unable to pay its debt to NWC.***

CP 340 (*emphasis added*).

During both the jury and bench trial portions evidence was admitted establishing the gratuitous transfer of the 38th Avenue lot. RP 3/14/12 at 52-62; RP 3/15/12 at 123-125; RP 3/15/12 190-197. In closing argument on the veil-piercing issue, NWC's counsel again hit this point:

> In addition to commingling, we have a situation where [Mr. Rehe] blatantly transferred assets out of the company -- the major assets of the company out and for no consideration, and the jury has already determined that. They obviously concluded there was no loan, and there is no evidence of any loans.
> ...
> In addition to stripping out the 38th Street property, stripping out the 89th Street, [he] denuded the company of

[7] This is in addition to the evidence that the Rehes had diverted substantial corporate funds for their personal benefit.

> any remaining assets and now there is insufficient money to pay the obligation

RP 3/26/12 47-48. And at oral argument NWC's counsel argued the point again. CP 984.

In spite of the clear evidence and ***NWC's repeated*** request that the trial court to consider the transfer of the 38th Avenue property as evidence of ***corporate gutting***, the trial court apparently believed that the issue of the transfer of the 38th Avenue property was only relevant to an un-pled cause of action under the UFTA, and was thus not before the court. The trial court stated:

> the jury was not asked to find that the transfer of the 38th Street property was a fraudulent conveyance. No one ever previously communicated to this Court that this Court was going to be asked to determine that the 38th Street [sic] conveyance was a fraudulent conveyance. I was asked to consider the issue of piercing the corporate veil.

CP 991. See also RP 7/27/12 at 8.

The trial court was simply incorrect when it stated that it had never been asked to consider the transfer of the 38th Avenue property as part of the corporate disregard claim. It had been asked to do so repeatedly by NWC: in the Complaint, the trial brief, and in closing argument. The trial court also appeared confused about its ability, under the case law, to consider evidence of corporate gutting. CP 988-989.

As a result of this confusion and disregard of virtually undisputed evidence, the trial court wrongly found that the Rehes did not intend to evade a duty owed to a creditor, and wrongly found that any corporate abuses did not cause loss to NWC.[8] The trial court then wrongly declined to hold the Rehes personally liable for the damages awarded against Unique. CP 1024-1027.

F. The Trial Court's Ruling on Attorney Fees

After the jury rendered its verdict and the trial court made its ruling on the issue of Corporate Disregard, NWC and the Rehes each requested fees under the Agreement between NWC and Unique. NWC based its request upon the time spent at trial on the various claims. CP 594-597; 855-871. The records maintained by the court clerk demonstrated that approximately 89% of the trial time related to NWC's successful breach of contract and UFTA claims, and that 11% related to corporate disregard. *Id.* Having won on the first two issues, and returned an asset worth potentially $300,000 to the corporation, NWC sought 89% of its attorney fees, or approximately $335,000. *Id.* The trial court made some reductions, but ultimately awarded fees to NWC based largely upon this proportional allocation method. CP 997.

[8] Findings of Fact 34-39 and Conclusions 5-12 (CP 1020-1027).

In contrast, the Rehes claimed that they were ***unable to segregate*** the fees spent upon their single ***successful*** defense of the one claim (that had been tried separately) from those spent upon the ***unsuccessful*** defenses of the other defendants on all of the other claims tried to the jury, and made no serious attempt to do so.[9] The Rehes sought ***virtually all of the fees*** that had been incurred ***by all Defendants*** in the case, or approximately $130,000. CP 455-467. This included fees spent on the unsuccessful defense of Unique on the breach of contract claim, the unsuccessful defense of Sahara and the LLLP on the UFTA claims, and the unsuccessful counterclaims asserted by Unique and Temporal. The Rehes' fee request also included time spent on the defense of Temporal, although that action had been dismissed prior to trial. The request even included defense fees incurred in the 16 months ***before*** the Rehes were even added as defendants in this action. Counsel for the Rehes acknowledged that this fee request constituted essentially the total amount of all fees incurred by all Defendants in the litigation. RP 7/27/12 at 32.

[9] The Rehes' current counsel made a superficial attempt that identified a handful of excludable charges. CP 466. There was ***no attempt*** by the Rehes' to segregate the more than $30,000 in fees spent by the defendants' former counsel in the first two years of litigation – including 16 months in which the Rehes were not even defendants. CP 517-577.

Although the trial court applied proportional segregation with respect to NWC's fee request, it adopted a novel and legally unsupported approach to the award of fees to the Rehes:

> Just so you all know what my thought process is, pretend each and every defendant had a separate attorney.
> ...
> We're talking about an attorney is in here representing Mr. and Mrs. Rehe, and they are the prevailing party on the only claim the plaintiff had against them which is piercing the corporate veil. I need each of you to tell me what is the number that I should give in attorney's fees given that, and what is your rationale for achieving or arriving at that number.

RP 7/27/12 at 38. Counsel for the Defendants argued that, had he only been representing the Rehes,

> I would have been at everything -- the same court hearings, I would have been at all the same trials, all of the same depositions.... So the vast majority of what was incurred ***would have*** been incurred any ways.

RP 7/27/12 at 51 (emphasis added). The trial court agreed with this position and awarded the Rehes $85,000. RP 7/27/12 at 53.

This award compensates the Rehes for ***67%*** of the ***fees incurred by all five defendants*** even though the all of the other defendants lost and the Rehes' successfully defended only a single claim that took up only ***11%*** of the trial time.[10]

[10] The Court also awarded the Rehes $3,509 in costs. This constitutes ***100%*** of all of the defendants' costs for the entire case. RP 7/27/12 at 67-68.

G. Northwest Cascade's Total Recovery

Judgment was entered on behalf of NWC against Unique in the amount of $512,322.73. CP 1038. The transfer of the 89th Street Residence was also reversed (CP 1039), leaving Unique with a single asset with an assessed value of $327,000. Ex. 92. This left a deficiency of more than $189,000.[11]

The trial court did not pierce the corporate veil, despite the Rehes' admission that they transferred the 38th Avenue lot into their personal trust fund for no consideration and diverted at least another $177,000 in corporate assets to their personal benefit. The 38th Avenue lot had an assessed value of $253,180 at the time of transfer. Ex. 121. The Rehes were personally awarded costs and fees in the amount of $88,509.00.

IV. STANDARD OF REVIEW

The appellate court reviews facts underlying a trial court's decision on corporate disregard for substantial evidence. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924, 982 P.2d 131 (1999). It reviews *de novo* the legal conclusions that support corporate disregard. *Id.*

The amount of an award of attorney fees is discretionary, but will be overturned when there has been an abuse of discretion. *Mayer v. City of*

[11] Assuming that the 89th Street Residence can be executed on and sold at the assessed value.

Seattle, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). An award of fees is an abuse of discretion when it is "manifestly unreasonable or based upon untenable grounds, or if no reasonable person would take the position adopted by the trial court." *Id.* (*citing Allard v. First Interstate Bank of Wash., N.A.*, 112 Wn.2d 145, 148–49, 768 P.2d 998 (1989)).

V. ARGUMENT

A. The trial court erred in finding that the Rehes did not intentionally use the corporate form to violate a duty to NWC, and did not cause an unjustified loss to NWC that warranted disregarding the corporate form and imposing personal liability on the Rehes despite the overwhelming evidence that they gutted Unique of assets and diverted substantial corporate funds for their personal benefit.

NWC asked the trial court to disregard Unique's corporate form and hold the Rehes personally liable for the corporation's debt to NWC. In support of this request, NWC offered evidence of (1) the Rehes' post-suit gutting of the 38th Avenue Lot, and (2) the Rehes' repeated diversion of corporate assets to their personal benefit, and to the detriment of NWC.

The law will disregard the corporate form and make shareholders liable for the debts of a corporation where (i) the shareholders intentionally used the corporate form to violate or evade a duty, and (ii) the shareholders' conduct resulted in an unjustified loss to the creditor. *Morgan v. Burks*, 93 Wn.2d 580, 585, 611 P.2d 751 (1980); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982).

In this case, the trial court found numerous abuses of the corporate form.[12] Nevertheless, the trial court also found (i) that the Rehes did not intentionally manipulate Unique to violate or evade its duties, and (ii) that the Rehes' conduct did not cause unjustified loss to NWC.[13] Ultimately, these findings and conclusions are based upon the trial court's confusion regarding the doctrine of corporate disregard. The findings are not supported by substantial evidence, and are based upon errors of law.

1. The Trial Court erred in finding that the Rehes did not intentionally use Unique's corporate form to evade a duty owed to NWC.

In order to disregard the corporate form and hold shareholders liable for corporate obligations, the corporate form must first be intentionally used to violate or evade a duty. *Meisel*, 97 Wn.2d at 410.

> With regard to the first element, the court must find an abuse of the corporate form. ***See examples catalogued in Harris, [Washington's Doctrine of Corporate Disregard, 56 Wash.L.Rev. 253, 260 n.38 (1981)]***.... such abuse typically involves "fraud, misrepresentation, ***or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment.***"

Id. (*emphasis added*). In addition, this element is met when ***the liable corporation has been "gutted" and left without funds*** in order to avoid actual or potential liability. *Morgan*, 93 Wn.2d at 585.

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[12] See Findings 20, 21, 22, 29, 31, 32, 33, and 35.

[13] These two basic findings are reflected in a number of Findings of Fact and Conclusions of Law. *See* Findings 37 through 39, and Conclusions 6 through 11. CP 1025-1027.

Despite extensive evidence and an express finding of numerous corporate abuses (Finding 29), the trial court made one finding of fact (Finding 35) and one conclusion (Conclusion 5) that led it to conclude that the Rehes did not use the corporate form with intent to violate or evade a duty to NWC. These findings and conclusions are based largely on two legal errors: (1) the trial court's refusal to even consider the transfer of the 38th Avenue Lot, and (2) the failure to apply the correct "intent" standard.

a. The trial court erred by failing to even consider the transfer of the 38th Avenue Lot in deciding whether an intentional abuse of the corporate form had occurred.

NWC argued, in its Complaint, its Trial Brief, and in closing argument, that the trial court should consider the Rehes' transfer of the 38th Avenue Lot as evidence that the Rehes "gutted" Unique to avoid actual or potential liability. The trial court erred by refusing to consider this evidence and finding, to the contrary, that no intentional abuse occurred. No reasonable finder of fact, properly considering the transfer of the 38th Avenue Lot, could reach any finding other than that the Rehes had intentionally abused the corporate form to evade a duty.

There is no dispute that the Rehes transferred the 38th Avenue Lot from Unique and into a family trust after the commencement of litigation. RP 3/14/12 56-62; Ex 87 and 121. At the time the Lot was transferred,

Unique had only minimal cash reserves of approximately $7,000. Exs. 275 and 277. Unique's sole remaining asset, the 89th Street Residence, was subsequently transferred out of Unique's name with ***actual intent*** to hinder, delay or defraud its creditors. CP 408. The transfer of the 38th Avenue Lot was not noted as a distribution or a loan repayment on either Unique's tax returns or the Rehes' returns. Ex. 85; Ex 101. The Rehes offered no evidence that the transfer of the 38th Avenue Lot served a legitimate business purpose, and in fact the Rehes attempted to hide evidence related to the transfer (see Section III.C above). This is the very essence of corporate gutting, and there is no substantial evidence to support a contrary finding.

As a matter of law, the corporate form is intentionally used to violate or evade a duty where "the liable corporation has been 'gutted' and left without funds by those controlling it in order to avoid actual or potential liability." *Morgan*, 93 Wn.2d at 585. Such gutting "***must*** be considered" by the trial court, "and often will independently support disregard of the corporate entity, because it is only after [liability has attached] that the impetus to "gut" the corporation arises." *Id.*

However, in spite of this clear legal authority, the trial court was confused as to whether the 38th Avenue transfer related to corporate

disregard or to an unpled cause of action under the UFTA. This is apparent from the following exchange:

> [THE COURT:] Now, the facts that happened after he stopped paying on the Northwest Cascade was really the transfer of the 89th Street property.
>
> [NWC'S COUNSEL]: Well, and the 38th Street property. Both properties.
>
> THE COURT: But the 89th Street property we have a jury verdict determining that was a fraudulent conveyance. We do not have a determination that the transfer of the 38th Street property was.
> ...
> [NWC'S COUNSEL]: ***That's something you have to decide that on the piercing question.***
>
> [REHES' COUNSEL]: No. They didn't even name Winnemucca as a party.
>
> [NWC'S COUNSEL]: We did not assert that ***as a fraudulent transfer claim.***

CP 988-989 (*emphasis added*). NWC explained further,

> [T]he other half of this piece is ... the 38th Street [sic] property was clearly taken out for no consideration. Now, the jury wasn't asked to address that because that was not a fraudulent conveyance claim, ***but it was an asset stripped out of the company that's worth 200 and some thousand dollars*** that has -- that was taken for no value, by Mr. Rehe's own admission....
>
> That again deprives [NWC] of an asset that should have been in the corporation to pay what the final judgment is in this case....

CP 984. In spite of this argument, the trial court announced that it would ignore the transfer of the 38th Avenue lot. The trial court stated:

> No one ever previously communicated to this Court that this Court was going to be asked to determine that the 38th Street conveyance was a ***fraudulent conveyance***. I was asked to consider the issue of ***piercing the corporate veil***. I've read the case law, as I've already indicated. I believe that the jury verdict requires the 89th Street property to be returned to Unique Construction. Beyond that, I am not finding that Mr. Rehe's inadequate bookkeeping, his commingling of assets and payment of what I think were, over time, relatively di minimus [sic] personal expenses out of a corporation can meet the test of the doctrine of corporate disregard, especially since it's considered an extraordinary remedy, and I do believe it is a remedy. So that's my decision.

CP 991-992 (*emphasis added*).

NWC had repeatedly, and at every stage of the proceeding, asked the trial court to consider evidence of the 38th Avenue Lot transfer as "corporate gutting" under *Morgan*, 93 Wn.2d at 585. Under *Morgan* the trial court was ***required*** to consider the issue of corporate "gutting" in evaluating the corporate disregard claim. *Id.* It did not do so, and wrongly disregarded the transfer of the 38th Avenue Lot in its subsequent findings and conclusions.

As a result, the trial court's ultimate refusal to find liability under the corporate disregard theory was based solely on its conclusions regarding "commingling" of funds and "substandard accounting":

> 5. The commingling of personal and corporate funds and lack of adequate records were not designed to defraud, manipulate, or misrepresent the corporate status. The substandard accounting procedures of Unique Construction

> in this case do not, standing alone, support disregarding the corporate form because it was not done fraudulently or with the intent to defraud.[14]

CP 1026. The trial court erred by ignoring the undisputed fact that the Rehes gutted Unique of the majority of its net worth after the litigation was commenced. *Morgan*, 93 Wn.2d at 585.

The trial court apparently believed that the only remedy for post-suit corporate gutting would be for NWC to bring an UFTA claim against Winnemucca Ventures. However, this is contrary to the Washington Supreme Court's holding in *Morgan*. There, the Court ***specifically rejected*** the appellants' argument "that post-tort wrongful activities should always be dealt with by voiding transfers." *Morgan*, 93 Wn.2d at 584. Instead, the *Morgan* Court held that after-the-fact transfers are strong evidence of gutting and "are relevant in determining whether to assess personal liability against shareholders for a judgment originally entered against the corporation." *Id.* at 586.

The significance of *Morgan* is that when corporate assets have ***already*** been returned to the corporation through a successful fraudulent transfer claim, the harm stemming from that particular transfer has been rectified and the voided transfer does not ***by itself*** justify further personal liability against shareholders. However, here the transfer of the 38th

[14] The intent issue is addressed in Section V.A.1.b, below.

Avenue Lot has not been voided, and under the rule of *Morgan*, it is not only proper but also mandatory for the trial court to consider this transfer as evidence supporting corporate disregard. *Morgan*, 93 Wn.2d at 585 ("***must*** be considered").

In *Morgan*, a corporate executive shot Morgan, and the corporation subsequently distributed substantial assets to two shareholders. The corporation then declared bankruptcy. However, the bankruptcy court ***voided the asset transfers*** and ***returned the assets*** to the corporation. Morgan later sought to pierce the corporate veil on the basis of the fraudulent transfers, and hold the two shareholders personally liable.

In finding that the return of assets to the corporation obviated the need for corporate disregard, the Supreme Court held, "[a]ny disregard of the corporate entity ***now*** would subject to judgment ***no funds intended to be corporate***, but only those purely individual assets of defendants." *Morgan*, 93 Wn.2d at 588 (*emphasis added*). This contrasts sharply with the facts present here: although the transfer of the 89th Street Residence has been voided, the Rehes remain in possession of assets "***intended to be corporate***" – principally, the 38th Avenue Lot.[15] The Rehes gutted Unique of this considerable asset, after the potential for liability had

[15] The Rehes also remain in possession of the improperly diverted liquid assets, as will be discussed further below.

arisen, and this gutting not only "must" be considered, but also standing alone justifies the requisite findings supporting corporate disregard.

The rule in *Morgan* is sound, especially under circumstances such as those present here. When corporate gutting occurs, the perpetrators frequently attempt to hide the fact and the circumstances of the transfer. Here, the Rehes transferred the property to an unregistered trust, and subsequently to a Nevada LLC with no disclosed members. RP 3/15/12 124-125. Mr. Rehe subsequently lied about the transfer at his deposition, (CP 735) and then refused to disclose the true circumstances of the transfer in violation of a court order. Ex. 269.

The Rehes gutted their corporation by transferring the 38th Avenue Lot out of Unique's name, at a time when Unique owed NWC $140,000 plus substantial interest, and faced ongoing liability in the form of contractual attorney fees. In assessing a transfer occurring one month ***before*** the transfer of the 38th Avenue Lot, and another occurring six months ***after***, the jury determined that both transfers were undertaken with ***actual intent to hinder, delay or defraud a creditor***. It is clear that the Rehes intentionally used the corporate form to evade a duty owed to NWC when Unique transferred the 38th Avenue Lot, for no consideration, to the Rehes' family trust. The trial court's finding is based upon its confusion and its error of law in ignoring the gutting of the corporation.

b. The trial court erred in finding that the Rehes' blatant diversion of corporate funds was merely "inadequate recordkeeping" and "commingling" rather than conduct designed to evade a duty to creditor NWC.

The trial court properly found that the Rehes engaged in a number of corporate abuses:

> 29. There was a ***consistent disregard of corporate accounting principles*** by Bill Rehe on behalf of Unique, including: (a) ***cashing of corporate checks made out to "Cash"*** by Mr. Rehe with no record of how the cash was used and no records indicating that such cash payments were accounted for as income to the Rehes; (b) ***payment of the Rehes' medical premiums and deductible expenses, personal utility bills, and other personal expenses*** without properly accounting for same on the Rehes' personal tax returns as income; (c) inadequate tax reporting; (d) use of personal credit cards for ***both personal expenses and business expenses*** and the ***payment of the commingled credit card charges with corporate funds*** without segregating the personal expenses and allocating those to income; and (e) use of the 89th Street Property for several years without payment of rent to Unique.

CP 1024-1025 (*emphasis added*). The trial court also found that "Mr. Rehe treated his corporate and personal assets as one and the same. Mr. Rehe commingled the assets because in his mind all of the assets belonged to him." FOF 32 at CP 1025.

Indeed, the testimony of Paul Pederson showed that between 2005 and 2008, while Mr. Rehe was developing the Rehe Plat, the Rehes diverted at least $177,000 worth of Unique's assets to the Rehes' personal use – ***not including the 38th Avenue Lot.*** See § III.B, *supra*. During this

same period, Unique reported ***losses to the IRS***. Ex. 85. Unique's expenses exceeded its revenue, yet ***the company continued to pay the Rehes' personal expenses***, and ***continued to become indebted to NWC***.

Nevertheless, the trial court wrongly found that the corporate abuses of the Rehes detailed above were not intended to violate or evade a duty to Unique's creditors. In so doing, the trial court misapplied the law regarding intent. First, the trial court erroneously found that:

> 35. ...While Mr. Rehe's accounting practices are substandard, they were ***not designed to intentionally evade a duty to a creditor.***

CP 1025 (*emphasis added*). In addition, the trial court wrongly concluded:

> 5. The commingling of personal and corporate funds and lack of adequate records ***were not designed to defraud, manipulate, or misrepresent the corporate status***. The ***substandard accounting procedures*** of Unique Construction in this case do not, ***standing alone***, support disregarding the corporate form because it was ***not done fraudulently or with the intent to defraud.***

CP 1026 (*emphasis added*). The trial court (through Findings and Conclusions drafted by the Rehes) obscures the true nature of the Rehes' corporate abuses, calling them "inadequate accounting procedures" and "commingling of assets and liabilities." But such characterization ignores the undisputed fact that Unique's recurring and periodic payments of the Rehes' personal expenses constituted a diversion of critical liquid assets away from the corporation and into the Rehes' pockets, all while Unique

incurred mounting debts to NWC.[16] There was no evidence to support the notion that the repeated diversion of assets was accidental, and it does not take an MBA degree to understand that regularly diverting assets from an unprofitable corporation will be detrimental to the company's creditors.[17] As Mr. Pederson testified:

> [The Rehes' Counsel] It could just be bad bookkeeping?
>
> A No. ... The issue is that they're using their personal credit card to buy significant things and using the corporate pay to pay for the credit card including personal things, and it doesn't happen just once, it happens multiple times.

RP 3/22/12 at 26.

The trial court's Finding 35 and Conclusion 5 are erroneous because the trial court misapplied the intent standard set forth in *Meisel*.[18] Under *Meisel*, corporate disregard first requires the ***intentional use*** of the corporate form to violate or evade a duty. *Meisel*, 97 Wn.2d at 410.

> With regard to the first element, the court must find an abuse of the corporate form. ***See examples catalogued in [Harris, Washington's Doctrine of Corporate Disregard, 56 Wash.L.Rev. 253, 260 n.38 (1981)]***.... such abuse typically involves "fraud, misrepresentation, ***or some form***

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[16] Even if the regular diversion of assets were considered as "distributions," they are distributions made in violation of RCW 23B.06.400(2).

[17] FOF 33, 35, 37, and 39, and COL 5, 6, 8, and 9 are erroneous for the same reason. It is an error of law to conclude that the Rehes' regular siphoning of funds from their struggling corporation, in violation of RCW 23B.06.400(2)(a) is merely an accounting issue.

[18] Moreover, as addressed above in Section V.A.1.a, Finding 35 and Conclusion 5 do not take into consideration the post-suit transfer of the 38th Avenue Lot into the Rehes' personal trust for no consideration.

> ***of manipulation of the corporation to the stockholder's benefit and creditor's detriment.***"

Id. (*emphasis added*). "Intent to defraud" is not required. Rather, manipulation of the corporation to the stockholders' benefit and creditor's detriment ***is evidence of an intent to violate or evade a duty.***

William Rehe's diversion of corporate funds to his personal use clearly constitutes "manipulation of the corporation to the stockholders' benefit and the creditor's detriment," and thus satisfies *Meisel's* "intent" requirement. *Id.* The Rehes diverted over $150,000 of corporate cash and assets in the roughly two-and-one-half year period that Unique was building out the Rehe Plat[19], even though it was losing money. The Rehes dealt themselves substantial assets from the corporation, all while Unique refused to pay legitimate amounts due NWC for constructing a plat that was ultimately owned by the Rehes. This diversion of assets was done to the benefit of the Rehes, and to the detriment of NWC. It allowed the Rehes to avoid dipping into their $600,000 stock portfolio to pay their personal expenses while leaving NWC with an empty shell to pursue.

The quote from *Meisel* cited above directs Washington courts to consider the examples of corporate abuses detailed by Thomas Harris as

[19] This amount does not include the property transfers of the 38th Avenue Lot or the 89th Street Residence, or the funds expended to build out the Woodhill Residence.

evidence of an ***intent to evade a duty***. Harris supports a finding of corporate abuse where, as here, there is:

> Commingling of funds and other assets, failure to segregate funds of the separate entities, and ***the unauthorized diversion of corporate funds or assets to other than corporate uses***; **the treatment by an individual of the assets of the corporation *as his own***;

Harris, *Washington's Doctrine of Corporate Disregard*, 56 Wash.L.Rev. at 260 n.38 (1981) (*emphasis added*). The presence of these factors constitutes the requisite evidence of intent to violate or evade a duty. *Meisel*, 97 Wn.2d at 410. There is no additional requirement that the corporate abuse be committed with specific intent to defraud, as the trial court wrongly stated in Conclusion 5. Fraud and misrepresentation are merely two non-exclusive examples set forth in *Meisel*, but the standard is also satisfied where, as here, a shareholder manipulates the corporation by diverting assets to his personal benefit and to the detriment of corporate creditors. Such manipulation – even without fraud or misrepresentation – satisfies the evidentiary requirement for proof of intent to violate or evade a duty, especially in circumstances involving diversion of corporate funds.

Moreover, where, as here, the perpetrator of corporate self-dealing is highly experienced with both JD and MBA degrees, no rational fact-finder could conclude that this diversion of corporate assets was unintentional. Indeed, many courts hold that the diversion of funds –

especially of a struggling corporation – is sufficient evidence of shareholder's intent to support a finding of corporate disregard. *Crane v. Green & Freedman Baking Co., Inc.*, 134 F.3d 17, 23-24 (1st Cir. 1998) (while business was in decline, "the Elmans had been writing themselves and their relatives checks for no business purpose"); *Trustees of Nat. Elevator Indus. Pension, Health Benefit & Educ. Funds v. Lutyk*, 332 F.3d 188 (3d Cir. 2003) (diversion of funds for personal use justifies corporate disregard); *McCombs Const., Inc. v. Barnes*, 32 Wn. App. 70, 645 P.2d 1131 (1982) (same); *see also* 1 William M. Fletcher, Cyclopedia of the Law of Corporations § 41.30, at 663.

Based on the evidence of repeated diversion of funds and assets acknowledged by the trial court in Finding of Fact 29, no rational person can reach any conclusion other than that the Rehes were intentionally evading their duties to creditor NWC. The conclusion that the Rehes' diversion of corporate funds was not an attempt to evade a duty to a creditor is based upon the trial court's misreading of the intent requirement of *Meisel*, and is not supported by substantial evidence. NWC was not required to prove "intent to defraud." NWC was required to prove that Mr. Rehe "manipulate[d] the corporation" to his benefit and NWC's detriment. NWC proved that. There was no substantial evidence to support the trial court's contrary finding.

2. The trial court erred in finding that the Rehes' corporate gutting and substantial diversion of funds did not result in an unjustified loss to NWC.

In addition to proving that the Rehes intentionally abused Unique's corporate form to evade a duty,[20] NWC also proved that the Rehes' conduct resulted in unjustified loss to NWC.

A plaintiff asserting corporate disregard must establish that the shareholder's misconduct resulted in an "unjustified loss" to the creditor. *Meisel*, 97 Wn.2d at 410. Such a loss occurs when the shareholder's conduct has an "effect on the plaintiff's ability to collect a judgment from the defendant corporation." *Morgan*, 93 Wn.2d at 589; *see also Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn. App. 695, 708, 934 P.2d 715, 722 (1997) *aff'd*, 135 Wn.2d 894, 959 P.2d 1052 (1998).

But for the Rehes' corporate misconduct, NWC would have been able to collect the judgment in its favor from Unique. As such, NWC has proved that the Rehes' conduct has caused unjustified loss to NWC. A contrary finding by the trial court is not supported by substantial evidence.

[20] Through gutting the corporation of the 38th Avenue Lot, diverting corporate funds to his personal use, or both.

a. The Rehes' conduct was not *de minimus*, and had a direct effect upon NWC's ability to recover against Unique.

The trial court found that the Rehes' diversion of corporate assets "was diminimus [sic] in the overall view of the Unique activities, predated NW Cascade's contract, and did not cause the inability of Unique to pay its creditors." FOF 34; CP 1046. This finding is based upon clear legal error, and not supported by substantial evidence.

With respect to the finding that the diversion of funds was *de minimus*, the diversion of corporate funds can only be "*de minimus*" relative to one or more relevant points of comparison. Because the trial court did not provide any appropriate reference points, this conclusion is not supported by substantial evidence.

According to the summary exhibit prepared by accounting expert Paul Pederson, the personal use of corporate ***cash*** totaled, at a minimum, over $80,000 during the build out of the Rehe Plat. Ex. 273. In addition, from 2005 through 2009, Unique was foregoing $2,000 ***per month*** in rental income through the Rehes' uncompensated use of Unique's corporate property, for a total of $96,000. *Id.* In 2005, 2006, and 2008,[21]

[21] Unique failed to produce tax returns for 2007. The Rehes' personal tax return for 2007 showed no income from Unique, Ex. 101, supporting the conclusion that Unique made no money that year.

Unique operated at a net loss of $26,000. Ex. 85. Compared to Unique's annual profits, these figures are scarcely *de minimus*

Further, compared to the amount owed to NWC in April, 2008, the diversion of funds that occurred during the development of the Rehe Plat was very significant. Had the Rehes properly paid for their personal expenses with the private funds in their $600,000 stock account, Unique would have had over $150,000 to pay NWC.[22] The Rehes' diversion of corporate funds ***deprived Unique of critical liquidity*** needed to honor its existing and projected liabilities. When the Rehes later gutted Unique of its remaining real property asset, the Rehes further rendered Unique insolvent and unable to satisfy the debts owed to its creditors. Unique now (as a result of the jury verdict) has a single illiquid $327,000 asset with which to satisfy its $512,000 debt to NWC, while the Rehes retain over $400,000 of former corporate assets: diverted cash equal to at least $177,000 and real estate worth $250,000. The trial court's ruling that the Rehes' diversion of assets was *de minimus* is absurd in context and completely unsupported by the evidence.

The trial court may have believed that the diversion of funds was *de minimus* because no single diversion was more than a few thousand

[22] This fact also demonstrates that no substantial evidence supports the trial court's FOF 34 that the diversion of personal funds "did not cause the inability of Unique to pay its creditors." But for the diversion of assets, Unique would have had the cash to pay.

dollars. This position is legally unsupported and defies common sense. It is the cumulative effect of the diversions that the Court must consider in determining whether the aggregate diversions are material. There is no substantial evidence to support the trial court's determination that $177,000 in diversions was *de minimus* given the financial condition of Unique and its limited liquidity.

Moreover, the trial court's finding is unsupported for another reason: although accounting expert Paul Pederson testified that a minimum of $177,000 worth of corporate cash was diverted to the Rehes' personal use, the actual amount of the diversion was very likely much higher. RP 3/15/12 at 230-236. Mr. Pederson testified that the personal credit card charges, paid for with corporate funds, likely contained additional personal expenses beyond those that he was able to readily identify. However, because Mr. Rehe failed to produce ***any*** records documenting these expenses, the full extent of the diversion of assets cannot be known.[23] All we know is that Unique paid personal credit card bills of over $250,000 between 2005 and 2008 (*Id.*; see also Ex. 122), and the Rehes introduced no evidence that any of these personal credit card

[23] Mr. Rehe claimed that he retained hard copy documents for three years for tax purposes and then destroyed them. RP 3/26/12 at 38-39. Nevertheless, Unique failed to produce any accounting or financial records for 2006 or 2007, even though such documents were supposedly still available when they were requested in early 2010. Mr.

charges were proper business expenses of Unique. Where Unique cannot substantiate its own alleged business expenses, there is no substantial evidence supporting the trial court's finding that the diversion of corporate assets was *de minimus*.[24]

Further, the trial court's finding that the diversion of funds "predated" NWC's contract with Unique is also not supported by substantial evidence. Although the diversion of funds began before contract formation, it continued all the way through contract completion. NWC began negotiations with Unique in the summer of 2005, entered into a contract in March, 2006, performed its last work in December, 2007, and submitted its final invoice in April, 2008. Exs. 1 and 4-15. Thus, the period of the Rehes' diversion of corporate funds overlaps with the period during which Unique was becoming indebted to NWC.

The Rehes' regular diversion of corporate funds to personal uses, and their "gutting" of the 38th Avenue Lot, had a direct effect upon NWC's ability to collect, and caused unjustified loss to NWC. The evidence supports one and only one finding: that the Rehes' transfer of the 38th Avenue Lot and their regular diversion of funds while the corporation

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Rehe provided no explanation as to why he destroyed these documents in spite of this ongoing litigation,

[24] Under the applicable and analogous tax laws, the alleged destruction of corporate records does not relieve a corporation of the burden of substantiating alleged business expenses. *Moran v. C.I.R.*, T.C.M. (RIA) 2005-066 (T.C. 2005).

was struggling, directly affected NWC's ability to recover against Unique and caused unjustified loss. The trial courts findings to the contrary are reversible error.[25]

b. The Trial Court's findings regarding other "causes" of NWC's loss are not supported by substantial evidence, and are not relevant to the issue of unjustified loss.

The trial court also found that NWC's losses were caused by NWC's failure to run a credit check or review Unique's books. Though the Rehes argued this theory at length, they ***never offered any credit report or accounting records into evidence*** to demonstrate ***what NWC would have discovered*** had it inquired. As such, these findings and conclusions are based upon ***mere speculation*** and are unsupported.[26] Most importantly, neither the court nor the Rehes ever explained how such measures might have allowed NWC to predict or prevent the Rehes' ***later*** asset diversions and ultimate wholesale gutting of the corporation.

Further, this argument is based upon the erroneous belief that NWC had the burden of protecting itself from the Rehes' wrongful manipulation of corporate assets. Such a requirement effectively allows

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[25] See FOF 34, 37 and 39 and COL 6, 7, 9 and 10.

[26] See FOF 38 and 39 and COL 7 and 8. A portion of Finding of Fact 26 describes the contract as being contingent upon NWC's running a credit check. This is also error. While the plain language of the contract allowed NWC to run a credit check, this provision was for NWC's benefit and NWC was entitled to waive it.

shareholders to engage in corporate misconduct whenever the corporation's creditor fails to run a credit check. Requiring contracting parties to thoroughly investigate a corporation's internal financial records prior to entering into a contract is absurdly unrealistic and inconsistent with established case law. To the contrary, the law is clear that NWC was entitled to presume that Mr. Rehe would run Unique in compliance with federal and state laws, including the limitations on shareholder distributions in RCW 23B.06.400. As another court has explained,

> Golden Acres was insolvent [because...] defendants were siphoning funds out of the corporation at regular intervals.
> ...
> When it agreed to insure the loan to Golden Acres, HUD naturally assumed that Golden Acres would be managed like a normal corporation, with sufficient regard for solvency, corporate formalities, and corporate obligations. Refusal to pierce the corporate veil in this case would be unfair in that it would ***punish HUD for its misplaced trust and reward defendants for their abuse of the corporate form***.

United States v. Golden Acres, Inc., 702 F. Supp. 1097, 1107 (D. Del. 1988) (*emphasis added*) *aff'd*, 879 F.2d 860 (3d Cir. 1989).

The trial court's suggestion that "the downturn in the real estate market" (COL 7) contributed to NWC's loss is also unsupported. While the downturn in the real estate market may have contributed to ***Unique's*** eventual decline, NWC's right to be paid was not dependant upon the strength of the market or even the eventual sale of the Rehe Plat by

Temporal. NWC's contract was with Unique, which had substantial assets when the contract was entered into. Similarly, the court's finding that specific corporate assets of Unique weren't a "consideration" of NWC at the time of contract is irrelevant. FOF 38. Creditors are legally entitled to pursue any and all corporate assets in satisfaction of a debt. There is no legal authority for the proposition that a creditor is limited to only those assets that it knew about at the time of contracting.

3. This Court should remand with instructions that the trial court enter judgment in favor of NWC on its claim of corporate disregard.

When this Court properly considers the gutting of the 38th Avenue Lot, and the proper "intent" and "causation" standards of *Morgan* and *Meisel*, the facts are incontrovertible. Evidence of corporate gutting and diversion of funds is stark here, and no reasonable person could conclude that the Rehes did not intentionally manipulate Unique in order to evade a duty owed to Unique's creditors, or that NWC was not harmed thereby. Given the trial court's Finding 29, and the unrefuted evidence of the gutting of the 38th Avenue Lot, further proceedings would be a useless act. This Court should modify the trial court's decision and direct it to enter judgment on behalf of NWC against the Rehes. RAP 12.2; *In re Dependency of A.S.*, 101 Wn. App. 60, 72, 6 P.3d 11 (2000).

The first person to disregard Unique's corporate form was its president and primary stockholder, William Rehe – an executive with advanced degrees in both ***law*** and ***business***. Mr. Rehe diverted $177,000 of funds and assets, leaving Unique with insufficient liquid assets to cover its contractual liability to NWC. After NWC filed suit, Mr. Rehe then gutted Unique of its sole remaining assets.[27] Mr. Rehe knew or should have known that his diversion of corporate assets to his personal use, while his business was struggling, would prejudice the rights of Unique's creditors, while it preserved his personal stock portfolio. Mr. Rehe ignored this fact, continued with his regular diversion of corporate assets, and only amplified that diversion after NWC filed suit by gutting the corporation of its remaining assets.

> [W]hen the corporate stockholder himself by his overt acts in dealing with the corporation disregards the separate entity of the corporation to the prejudice of such third person, he can scarcely complain if the court judges him by his conduct and likewise disregards the corporate entity in order to enforce the right owed to the person dealing with that corporation.

Harrison v. Puga, 4 Wn. App. 52, 63, 480 P.2d 247 (1971). By diverting funds to his own personal use, and commingling assets beyond the ability to segregate, Mr. Rehe has intentionally used Unique to violate or evade

[27] Although the 89th Street Residence has been returned to Unique, Unique's contractual liability as determined by the judgment exceeds the assessed value of that single asset.

its duties to NWC. By additionally stripping the corporation of the 38th Avenue lot, the Rehes' actions "***independently support disregard of the corporate entity***." *Morgan*, 93 Wn.2d at 585. The trial court's decision on corporate disregard is fatally flawed and should be reversed. This Court should remand with directions to enter judgment in favor of NWC on the issue of corporate disregard.

B. The trial court erred in awarding fees to the Rehes that were incurred by other defendants in their failed attempts to defeat NWC's successful claims.

If the Court reverses the trial court's decision on NWC's claim for corporate disregard, then the Court need not reach the issue of attorney fees presented below. The Court need only vacate the fee award to the Rehes.[28] If the Court affirms the trial court on the corporate disregard claim, then it must address the errors addressed below.

The Rehes and the unsuccessful Defendants (Unique, Sahara, Temporal, and the LLLP) were all represented in this action by attorney Martin Burns. The trial court erred by not requiring the Rehes to segregate the defense fees related to the corporate disregard claim from the defense fees related to unsuccessful defenses of the other defendants. The trial court ***must*** require parties to segregate fees between successful

[28] If the Court enters judgment for NWC on the corporate disregard claim, it should remand with instructions to award fees to NWC on that claim.

and unsuccessful defenses. In awarding fees to the Rehes without segregation, and by employing an erroneous legal standard, the trial court allowed the Rehes to recover fees incurred by losing defendants on losing issues. Further, the amount of the Rehes' recovery is unreasonably disproportionate to the time spent at trial on corporate disregard.

1. The Trial Court erred in not requiring the Rehes to segregate their fees from the fees of the unsuccessful defendants.

Washington law is clear: an award of attorney fees "***must*** properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues." *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994). The party claiming an award of attorney fees has the burden of segregating its lawyer's time. *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

Unique and Sahara lost on all issues at trial, and are not entitled to any fees. The trial court also properly held that Temporal and the LLLP were not entitled to recover fees. Only the Rehes were entitled to fees due to their successful defense against NWC's claim of corporate disregard.[29] Mr. Burns represented all Defendants. He did not separately track the

[29] As addressed above, the trial court's decision on corporate disregard should be reversed.

work he performed based upon which issue or which client he was representing at any given time. Instead, Mr. Burns' invoices and time records commingled the work he performed for all defendants.

The Rehes had the burden of segregating their attorneys' time from the time spent representing the other Defendants.[30] *Loeffelholz*, 119 Wn. App. at 690. They did not do so. Instead, they submitted time sheets and invoices reflecting not only legal work spent upon the defense of the veil-piercing claim, but also legal work spent in defense of the unsuccessful Defendants. The veil-piercing claim was tried separately and occupied 11% of the total trial time, while the breach of contract and UFTA claims consumed 89% of the total trial time. CP 427-442; see also CP 594-595.

The Rehes argued that it was difficult to segregate the time spent on behalf of the various defendants and the various legal theories.[31] Instead, the Rehes simply asked the trial court for the "total amount" of the fees spent on behalf of all five defendants. RP 7/27/12 at 32.

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[30] Consistent with controlling Washington authority, NWC segregated its fees and costs, based upon a proportional methodology. *See, e.g., Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 767, 115 P.3d 349, 352 (2005); *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 833-34 (2012). NWC allocated its fees based on the proportion of time spent at trial on the various issues. CP 931. The trial court largely adopted this approach with respect to NWC's fees, with some reallocations. CP 997.

[31] In fact, the Rehes initially argued that the veil-piercing claims were "inextricably intertwined" with the contract and UFTA claims, despite the fact that these were different legal theories premised on different sets of facts and presented separately in separate jury and bench trials. Regardless, the trial court orally held that the Rehes were not entitled to fees relating to the contract and UFTA claims, RP 7/27/12 at 32-33.

The duty to segregate fees falls not only to the party requesting fees, but also on the trial court:

> [T]he court must separate the time spent on those theories essential to [the cause of action for which attorneys' fees are properly awarded] and the time spent on legal theories relating to the other causes of action.... This must include, on the record, a segregation of the time allowed for the [separate] legal theories....

Hume, 124 Wn.2d at 673 (alterations in original) (citing *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988).

The trial court should have rejected the Rehes' fee request outright and required the Rehes to provide it with a tenable basis for segregating their fees. *Loeffelholz*, 119 Wn. App. at 692. Alternatively, the trial court could have apportioned the Rehes' fees according to the proportional methodology it had already adopted with respect to NWC's fees. It did neither, and instead based an award on an untenable legal theory.

2. The trial court erred by using an untenable basis for the award of fees to the Rehes.

Rather than applying NWC's proportional approach to the Rehe's fees and costs, which would have resulted in a fee award of approximately $15,000, the trial court awarded $85,000 in fees to the Rehes. RP 7/27/2012 at 53; CP 1029. This amount represented 67% of the entire amount of fees incurred by all defendants, despite the fact that the defendants lost on virtually all issues and the Rehes prevailed on a single

issue that consumed only 11% of the trial time. CP 427-442. Not only did the trial court fail to require the Rehes to segregate their fees, but it also failed to provide, on the record, any segregation or other tenable basis for its award of fees to the Rehes. "The trial court must create an adequate record for review of fee award decisions, which means in part that the record must show a tenable basis for the award." *Loeffelholz*, 119 Wn. App. at 690. Failure to provide such a record constitutes abuse of discretion, and requires reversal. *Id.* at 692.

The trial court's decision on attorney fees (CP 1019) referenced and incorporated the trial court's letter ruling (CP 994-999), its oral rulings from the bench (RP 7/27/2012 at 14-68), and the Judgment (CP 1028-1031). But those sources do not provide an adequate record or "tenable basis" to support the trial court's award of fees to the Rehes.

The only explanation comes from the Report of Proceedings from July 27, 2012. There, the trial court indicated that it would base its award not upon what amount of time was ***actually expended*** on behalf of the Rehes' defense of the one claim, but upon what amount of time ***would have been expended*** on behalf of the Rehes ***if*** they had had their own attorney for the entire case:

> Just so you all know what my thought process is, ***pretend*** each and every defendant had a separate attorney.
> ...

> We're talking about an attorney is in here representing Mr. and Mrs. Rehe, and they are the prevailing party on the only claim the plaintiff had against them which is piercing the corporate veil. I need each of you to tell me what is the number that I should give in attorney's fees given that, and what is your rationale for achieving or arriving at that number.

RP 7/27/12 at 38 (*emphasis added*). Counsel for the Defendants argued that, had he only been representing the Rehes,

> I would have been at everything -- the same court hearings, I would have been at all the same trials, all of the same depositions, I would have been at all of the same things I did here, with the exception of probably the jury instruction and some briefing. So the vast majority of what was incurred would have been incurred any ways.

RP 7/27/12 at 51. The trial court agreed with this position:

> I would agree with Mr. Burns that he would had to have been at virtually everything and throughout the trial.

RP 7/27/12 at 52.

In short, the trial court awarded fees to the Rehes based upon what they "would have" spent on attorney fees, had Mr. Burns represented ***only*** the Rehes (***and*** sat through weeks of jury trial to which the Rehes were not parties). But Mr. Burns did not "only" represent the Rehes – he represented ***all*** the Defendants. The Rehes are receiving fees for time that Mr. Burns ***actually*** spent unsuccessfully defending Unique and Sahara at trial. As court records demonstrate, approximately 89% of the trial time was spent on NWC's ***successful*** breach of contract and UFTA claims. CP

427-442. The Rehes were not named defendants in these causes of action, and there is no reason why they should be awarded fees for Mr. Burns' representation of Unique and Sahara during this time.

Fee awards are not an exercise in "let's pretend." There is no case law to support of the proposition that the trial court may award fees based upon what ***would have been expended*** under some hypothetical situation that did not occur. Moreover, the trial court's assumptions and logic are fundamentally flawed. Mr. Burns billed hundreds of hours litigating Unique's defenses and counterclaims, and preparing for those issues at trial. If the Rehes had separate counsel, there would have been no need for that counsel to watch Mr. Burns perform this work. In the trial court's pretend world, the Rehes would be rewarded for having their separate counsel bill time while watching another lawyer prepare for, and lose, a jury trial. The fact that the Rehes chose to hire a single attorney to jointly represent the interests of all the Defendants does not change the result. Indeed, it makes it more imperative that the trial court apportion the fees ***actually*** spent between the successful and unsuccessful claims. *Hume*, 124 Wn. 2d at 672. Here, we have a bright line basis for allocating fees because the corporate disregard claim was tried separately to the court, and accounted for only 11% of the trial time. But even assuming arguendo that the defense of the Rehes on that single claim overlapped

somewhat with the defense of the other Defendants on the other claims, then the trial court must at a minimum apportion the shared fees among the five jointly represented Defendants. *Hardenbrook v. United Parcel Serv., Inc.*, 11-35309, 2012 WL 3016220 (9th Cir. July 24, 2012).[32]

The trial court's "would have" theory flies in the face of Washington law, under which the court should "discount hours spent on unsuccessful claims, duplicated effort or otherwise unproductive time." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). And it completely subverts the intent of the prevailing party attorney fee provision in the contract between NWC and Unique. NWC was the prevailing party, and Unique lost. The time that Mr. Burns spent representing Unique is simply not compensable – not in a fee award to Unique, and not in a fee award to the Rehes. The trial court's award to the Rehes of these fees is clearly an abuse of discretion.

Had the Rehes so chosen, they could have obtained separate counsel or required better record keeping of their joint defense counsel. They did not do either. The Rehes should not be rewarded for their refusal to properly segregate and account for their fees.

[32] "Fees which may be attributed to defending on overlapping claims by [different defendants] should be apportioned and reduced accordingly."

3. The award of fees to the Rehes was manifestly unreasonable.

The trial court's award of $85,000 in fees represents 67% of the total fees spent by the joint Defendants in this case. The evidence for the veil-piercing claims was largely distinct from the evidence presented on the breach-of-contract and UFTA claims. Approximately 89% of the trial time related to the issues of breach of contract and the two UFTA claims, while a mere 11% dealt with the issue of corporate disregard.

The circumstances here are on point with those present in the case of *Loeffelholz v. C.L.E.A.N., supra.* In *Loeffelholz*, the trial court awarded a defendant nearly half of all fees expended in the litigation for the successful defense against one of many issues. As the Court held,

> The record does not show that the claims were so interrelated as to excuse segregation. ***Nor will the record support a finding that $50,000 was reasonably incurred to establish a single defense (immunity) to a single claim (the IA defamation claim).*** This case embodied many claims and issues, and ***an award of nearly half the total fees incurred represents too high a proportion to be reasonable.***

Loeffelholz, 119 Wn. App. at 692 (*emphasis added*).

If "nearly half" of the total fees was unreasonable in *Loeffelholz*, the trial court's award of two-thirds of the total fees incurred by the defendants is unreasonable here. The Rehes established a single defense to a single claim, for only one defendant, while the remaining Defendants

lost on issues that took up 90% of the trial time. The award here also "represents too high a proportion to be reasonable." *Id.*

4. This Court should reverse the trial court's award of fees and remand for proper segregation of fees.

The trial court should have required the Rehes to segregate their actual fees incurred in defense of the veil-piercing claims from the fees spent by defense counsel on all of the other issues in the case. The basis for an award of fees is fees ***actually*** incurred by a party, not "pretend" fees that "might have" been incurred in a hypothetical situation. Washington law does not recognized the "would have spent" standard adopted by the trial court. The trial court's award of fees to the Rehes should be reversed and the trial court instructed to with instructions to base an award fees (if any are due) upon the trial time allocation method used by NWC in light of the Rehes refusal to properly segregate their fees from those of the other defendants.

C. This Court should award fees on appeal.

The Agreement between Unique and NWC provides for prevailing party attorney fees. Ex. 4. As such, NWC is entitled to fees should it be the prevailing party on appeal. RAP 18.1.

VI. CONCLUSION

For the reasons stated herein, the Court should reverse the trial court's findings and conclusions regarding corporate disregard and remand with instructions to enter judgment on behalf of NWC on that claim. In the alternative, the Court should remand with instructions to retry the veil-piercing component of this case under the proper legal standards. The Court should also reverse the award of attorney fees to the Rehes and remand with instructions to properly segregate and apportion the fees among the defendants.

RESPECTFULLY SUBMITTED this 18th day of January, 2013.

GROFF MURPHY, PLLC

Michael J. Murphy, WSBA No. 11132
Daniel C. Carmalt, WSBA No. 36421
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on February 8, 2013 a true and correct copy of the foregoing document to the counsel of record listed below, via the method indicated:

Martin Burns McFerran Burns & Stovall, P.S. P.O. Box 110426 3906 S. 74th St. Tacoma, WA 98409-1001 ***Counsel for Respondents***	☐ ☒ ☐ ☐ ☒	Hand Delivery Via Messenger Service First Class Mail Federal Express Facsimile E-mail

DATED: February 8, 2013.

Sarah Damianick, Legal Secretary
Groff Murphy, PLLC
E. sdamianick@groffmurphy.com

Appendix A

HONORABLE STEPHANIE A. AREND
Hearing: July 27, 2012, 10:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NORTHWEST CASCADE, INC., a Washington corporation;

Plaintiff,

v.

UNIQUE CONSTRUCTION INC., a Washington Corporation; TEMPORAL FUNDING, LLC, a Washington Limited Liability Company; WILLIAM REHE; JANE DOE REHE; the WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC;

Defendants.

No. 08-2-10045-1

JUDGMENT

FILED
DEPT. 12
IN OPEN COURT
JUL 27 2012
Pierce County Clerk
By DEPUTY

SUMMARY OF JUDGMENT

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

Judgment Creditor 1:	Northwest Cascade Inc.
Judgment Creditor 1's Attorney:	Michael J. Murphy and Groff Murphy, PLLC
Judgment Debtor 1:	Unique Construction, Inc. and Sahara Enterprises, LLC
Amount of Judgment (joint and several) against Unique Construction, Inc. and Sahara Enterprises, LLC in favor of Northwest Cascade Inc.:	$139,075.75
Prejudgment Interest as of ~~June~~ July 27, 2012:	$77,429.71

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~~Prejudgment Interest from June 28, 2012 to Entry of Judgment:~~	~~$45.72 per diem~~
Net Taxable Costs and Attorneys' Fees Awarded in Favor of Northwest Cascade Inc. and Against Unique Construction, Inc. ~~and Sahara Enterprises LLC~~ related to the breach of contract claims	$ 237,984.59 in attorneys' fees, and $ 25,162.37 in costs
Net Taxable Costs and Attorneys' Fees Awarded in Favor of Northwest Cascade Inc. and Against Unique Construction, Inc. ~~and Sahara Enterprises LLC~~ related to the UFTA claims	$ 32,730.36 in attorneys' fees, and ~~$ _____ in costs~~
Judgment Creditor 2:	William and Suzanne Rehe
Judgment Creditor 2's Attorney:	Martin Burns
Judgment Debtor 2:	Northwest Cascade, Inc.
Net Taxable Costs and Attorneys' Fees Awarded in Favor of William and Suzanne Rehe Against Northwest Cascade Inc. related to the veil-piercing Claim	$ 85,000.00 in attorneys' fees, and $ 3,509.00 in costs

The Judgment against the Judgment Debtors, including attorneys' fees awarded by this judgment, is to bear an interest at 12% per annum accruing from the date of entry of this Judgment.

JUDGMENT

THIS MATTER came on before court for trial on March 7, 12, 13, 14, 15, 20, 21, 22, and 26, 2012. Plaintiff was represented by and through its attorney Michael J. Murphy and Dan Carmalt of Groff Murphy, PLLC. Defendants were represented by Martin Burns of McFerran, Burns & Stovall, P.S. The court separated issues to be tried before the jury and to the court. On March 23, 2012, the jury returned a verdict in favor of Plaintiff on all issues presented to the Jury. On March 29, 2012, the

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court issued an oral ruling denying Plaintiff's request to pierce the corporate veil and hold William and Suzanne Rehe liable for the amounts due Northwest Cascade Inc. based on the Jury Verdict. On April 27, 2012, the Court orally granted Plaintiff Northwest Cascade Inc.'s Motion for Prejudgment Interest, which ruling is addressed below. On June 27, 2012, the Court entered Findings of Facts and Conclusions of Law on the veil piercing claim, and by entry of this Judgment addresses the parties' respective requests for attorneys' fees and costs.

Consistent with the Jury Verdict, the Findings of Fact and Conclusions of Law on the veil piercing claim, and the oral order granting Northwest Cascade Inc.'s Motion for Prejudgment Interest, and the Court's determination of the amounts due each party for attorneys' fees and costs, the Court now enters judgment as follows:

1. Judgment is entered in favor of Northwest Cascade Inc. against Unique Construction, Inc. in the principal amount of $139,075.75.

2. The jury verdict in favor of Northwest Cascade Inc. is a liquidated amount and Northwest Cascade Inc. is entitled to interest at 12% per annum pursuant to its contract with Unique Construction, Inc.

3. Judgment is entered in favor of Northwest Cascade Inc. and against Unique Construction, Inc. in the amount of $77,429.71 in prejudgment interest through July 27, 2012 ($45.72 per diem).

4. The Total Judgment entered in favor of Northwest Cascade Inc. and against Unique Construction, Inc. is $ 512,322.73 (not including attorneys' fees and costs awarded in this Judgment). The total judgment entered in favor of the Rehes against Northwest Cascade $8,509 for attorney fees and costs.

5. Post-judgment interest shall accrue on the Total Judgment from the date of entry at the interest rate of 12% per annum.

6. Northwest Cascade Inc. and William and Suzanne Rehe are entitled to a portion of their attorney fees as set out in this Court's Order Awarding Attorney Fees and in the Summary of Judgment above.

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7. Pursuant to the Jury Verdict regarding Unique Construction Inc.'s fraudulent transfer of property, Title to the property located at 2316 89th Street Court Northwest, Gig Harbor, WA 98332, legally described as Lot 7, East Harbor Estates, according to plat recorded under Auditor's No. 9308250624, in Pierce County, Washington, is hereby quieted in favor of Unique Construction, Inc. Unique Construction is hereby enjoined from any future encumbrance or transfer of the property, pending satisfaction of the judgment in favor of Northwest Cascade, pursuant to all provisions of this Judgment.

8. The claims against The William K. & Marian L. LLLP are dismissed as moot.

ENTERED this 27 day of July, 2012.

Hon. Stephanie A. Arend

FILED
DEPT. 12
IN OPEN COURT
JUL 27 2012
Pierce County Clerk
By _____ DEPUTY

Presented by:

GROFF MURPHY, PLLC

Michael J. Murphy, WSBA #11132
Daniel C. Carmalt, WSBA #36421
Attorneys for Northwest Cascade, Inc.

Approved as to form:

23412
Attorney for Defendant

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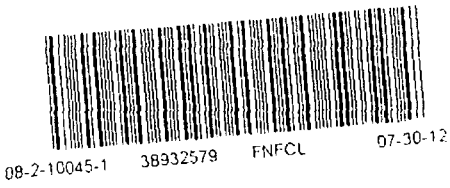
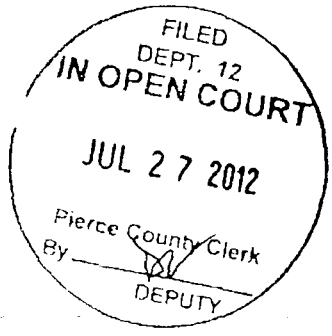
Appendix B





Hon. Stephanie A. Arend

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NORTHWEST CASCADE, INC., a Washington corporation;

Plaintiff,

v.

UNIQUE CONSTRUCTION INC., a Washington Corporation; TEMPORAL FUNDING, LLC, a Washington Limited Liability Company; WILLIAM REHE; JANE DOE REHE; the WILLIAM K AND MARION L LLLP; and SAHARA ENTERPRISES, LLC;

Defendants.

No. 08-2-10045-1

~~PROPOSED~~ FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on before this court for trial on March 7, 13, 14, 15, 20, 21, 22, and 26, 2012, in the above entitled matter, Plaintiff being represented by and through its attorney Michael Murphy of Groff Murphy, PLLC., and the Defendants being represented by Martin Burns of McFerran, Burns & Stovall, P.S., and the court having separated issues to be tried before the jury and to the court, the court hereby enters Findings of Facts and Conclusions of Law with regards to the claim of corporate disregard and piercing of the corporate veil asserted by the Plaintiff against defendants William Rehe and Suzanne Rehe.

I. FINDINGS OF FACT

1. Unique Construction, Inc., ("Unique") is a Washington corporation owned 51 percent by William "Bill" Rehe, and 49 percent by his wife Suzanne Rehe (collectively "Rehe").

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2. Unique was incorporated in the 1980s and has remained incorporated through the date of trial.

3. Unique is an S-Corporation under IRS regulations which receives "flow through" treatment thus being subject to single-level taxation at the personal level.

4. At trial, both the corporate tax returns and personal returns of Unique and Rehe, respectively, were admitted into evidence.

5. Bill Rehe prepared both his personal tax returns and Unique's corporate tax returns.

6. Bill Rehe is the President of Unique.

7. Unique operates a small home building business focused primarily in Pierce and Kitsap County.

8. Rehe also would form other entities either wholly owned by Rehe or in conjunction with third parties related to specific construction projects.

9. Bill Rehe accounted for his various projects wherein each project had its own "box" wherein he would segregate various receipts, bills, and other documents related to the project. Periodically he would input the data into his computer using a computer program known as Quick Books.

10. In or about 2008 or 2009, Rehe's computer hard drive failed causing a loss of such records.

11. Bill Rehe's accounting methods remain largely unchanged from the 1980s through the events giving rise to the present litigation.

12. In or about 2004 and 2005, Rehe began assembling real property lots for a development of the project in East Tacoma which became known as the Rehe Plat, the development giving rise to this litigation.

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13. The lots necessary for the plats were originally acquired in Unique's name, but in 2005 Unique transferred the lots to a single-purpose limited liability company called Temporal Funding, LLC, wholly owned by the Rehe's.

14. Initial plat designs were done by AHBL Engineering, which designed the subject plat into a 34-lot subdivision. While Rehe had prior experience in home building and short plats, he had never engaged in a larger project such as this 34-lot subdivision.

15. On March 27, 2006, Unique entered into a contract with Plaintiff Northwest Cascade, Inc. ("NW Cascade"), to perform infrastructure work on the Rehe Plat. Trial Exhibit No. 4 was the contract between the parties.

16. At the time NW Cascade and Unique contracted on March 27, 2006, Unique Construction owned two other properties, both in Gig Harbor, known as the "38th Street Property" and which was a multi-acre undeveloped lot and the "89th Street Property" which was a house built by Unique which had been the subject of separate litigation unrelated to this case.

17. The Rehes in or about 2006 moved into the 89th Street Property. The Rehes moved out of the 89th Street Property for an 18-month period thereafter but were again residing in the 89th Street house at the time of trial. The Rehes paid no rent to Unique for their use of the 89th Street Property.

18. Mr. Rehe testified that the funds used to purchase the 38th Street Property and the 89th Street Property as well as the funds to construct the 89th Street house came solely from the Rehes' personal funds. At trial, the Rehes argued that such funds constituted shareholder loans to Unique, and that the transfers of the 38th Street Property and the 89th Street Property were in repayment of shareholder loans. There were no records of any shareholder loans to Unique and such loans were not reflected on the Rehes' tax returns. The Jury found that Unique Construction received no reasonably equivalent value in exchange for the 89th Street Court property.

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19. NW Cascade commenced work almost immediately after the March 27, 2006 contract was signed. Disputes arose which led to a jury trial on a portion of this case wherein the jury on March 23, 2012, found Unique in breach of said contract and awarded NW Cascade $139,075.75.

20. On July 29, 2009, Unique recorded a quitclaim deed for the 89th Street Property to Black Point Management, LLC, a Nevada Limited Liability Company ("Black Point"). Black Point thereafter by quitclaim deed recorded on December 16, 2010, transferred the 89th Street house to Defendant Sahara Enterprises, LLC, a Nevada Limited Liability Company ("Sahara") ultimately controlled by the William K. and Marion L, LLLP, a Nevada LLLP. The transfers were all identified as tax exempt and there was no consideration paid for any of the transfers.

21. The jury found that Unique transferred the 89th Street Court property to Black Point Management LLC with the actual intent to hinder, delay, or defraud creditors. The jury also found that the transfer was constructively fraudulent because Unique did not receive reasonably equivalent value for the transfer and that the transfer left Unique insolvent.

22. On January 9, 2009, Unique quit claimed the 38th Street Property to Black Point which in turn transferred the 38th Street Property to Winnemucca Enterprises, LLC, another Nevada Limited Liability Company ultimately controlled by the William K. and Marion L., LLLP and the Rehes. ~~There was no consideration for any of the transfers of the 38th Street Property.~~

23. The William K. and Marion L., LLLP was formed on November 7, 2008, at the direction of the Rehes using an entity known as Nevada Corporate Headquarters.

24. Rehes previously had used Nevada Corporate Headquarters in about 2003 for basic wills, powers of attorney, and instructions to physicians.

25. NW Cascade did not name Winnemucca Ventures, LLC, as a defendant and did not include a cause of action in this lawsuit that the transfer by Unique of the 38th Street Property to Black Point and then to Winnemucca Ventures, LLC, was a fraudulent conveyance."

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26. At the time of the March 27, 2006 contract, NW Cascade did not ask for personal guarantees of the Rehes, additional collateral, personal financial statements of the Rehes, or financial statements of Unique. Despite the contract being contingent on NW Cascade obtaining and reviewing a credit report of Unique, no credit report was ever ordered by NW Cascade as to Unique.

27. The Rehes personally had a stock portfolio which Bill Rehe inherited from his parents in or about 2002.

28. Such stock portfolio was never in Unique's name.

29. There was a consistent disregard of corporate accounting principles by Bill Rehe on behalf of Unique, including: (a) cashing of corporate checks made out to "Cash" by Mr. Rehe with no record of how the cash was used and no records indicating that such cash payments were accounted for as income to the Rehes; (b) payment of the Rehes' medical premiums and deductible expenses, personal utility bills, and other personal expenses without properly accounting for same on the Rehes' personal tax returns as income; (c) inadequate tax reporting; (d) use of personal credit cards for both personal expenses and business expenses and the payment of the commingled credit card charges with corporate funds without segregating the personal expenses and allocating those to income; and (e) use of the 89th Street Property for several years without payment of rent to Unique.

30. The Plaintiff's expert, Paul Pederson, found the substantial majority of such questionable expenses occurred before 2008, and the court concurs and so finds.

31. The Rehes lived in the 89th Street Property rent free for the entire period from 2005 through the date of trial, except for an unspecified 18 month period during which they did not live in the 89th Street Property. Loan application documents showed that the Rehes proposed to use the 89th Street Property as collateral for a personal line of credit with Bank of America in January 2007 (Ex. 83), but there was no evidence presented that a deed of trust or mortgage was ever recorded securing the Bank of America personal line of credit with the 89th Street Property.

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32. There was no interest accrued or paid to the Rehes for loans to Unique. There were no documents reflecting any shareholder loans to Unique, and no such loans were reflected on the Rehe tax returns. There were no payments to the Rehes for the use of any contributed capital. Mr. Rehe treated his corporate and personal assets as one and the same. Mr. Rehe commingled the assets because in his mind all of the assets belonged to him.

33. The reason Bill Rehe's accounting was substandard is that he viewed the S-Corporation as a "flow through" entity and understood that such distributions, be it wages, owner's distributions, or profits, would eventually flow out to his personal tax return where it would be treated as ordinary income and hence the exact characterization of the distributions were, in Mr. Rehe's mind, immaterial.

34. The amount of personal expenses that may have been run through the business was diminimus in the overall view of the Unique activities, predated NW Cascade's contract, and did not cause the inability of Unique to pay its creditors.

35. Mr. Rehe's accounting practices were substandard. He incorrectly viewed the S-Corporation as a "flow through" entity and that meticulous formalities were not needed. While Mr. Rehe's accounting practices are substandard, they were not designed to intentionally evade a duty to a creditor.

36. Unique maintained its formal corporate status with the State of Washington and paid all fees.

37. It was not the manner in which Mr. Rehe kept books or the commingling of personal and corporate funds that harmed Northwest Cascade.

38. The assets that Northwest Cascade is trying to reach were never a consideration of Northwest Cascade when entering into the contract. The attempts to pierce the corporate veil is an attempt by Northwest Cascade to create a fund against which to collect a judgment.

39. Prior to entering into the contract, Northwest Cascade did not ask to see the books or financial records of Unique or the Rehes. Therefore, the abuse of the corporate form by

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commingling and the Rehe's personal use of corporate assets did not mislead Northwest Cascade.

II. CONCLUSIONS OF LAW

WHEREFORE, having found as set forth above, the court concludes as follows:

1. Piercing of the corporate veil is an extraordinary remedy.

2. NW Cascade is not entitled to a solvent defendant.

3. The use of the Doctrine of Corporate Disregard is not to be used to create a fund to satisfy a potential judgment.

4. Harm to the creditor alone does not establish grounds for piercing the corporate veil.

5. The commingling of personal and corporate funds and lack of adequate records were not designed to defraud, manipulate, or misrepresent the corporate status. The substandard accounting procedures of Unique Construction in this case do not, standing alone, support disregarding the corporate form because it was not done fraudulently or with the intent to defraud.

6. The substandard accounting procedures of Unique did not prejudice NW Cascade nor did it cause NW Cascade's loss and hence are not a basis to disregard the corporate entity.

7. NW Cascade's failure to utilize adequate legal safeguards coupled with the downturn in the real estate market contributed to NW Cascade's loss.

8. NW Cascade, at no time, relied, factually or legally, upon Unique's bookkeeping in entering into the contract on March 27, 2006.

9. NW Cascade did not prove a causal relationship between Mr. Rehe and/or Unique's substandard accounting and comingling of personal and corporate assets with NW Cascade's loss.

10. Piercing of the corporate veil is not necessary to prevent an unjustifiable loss to NW Cascade.

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11. Piercing the corporate veil to reach the Rehes' personal assets would not serve the equitable purposes of the Doctrine of Corporate Disregard. Doing so would serve only to impermissibly create a fund for NW Cascade to collect its judgment.

12. The Rehes ~~and the William K. and Marion L. Lloyd~~ are ~~should be~~ dismissed with prejudice.

~~13. Issues regarding application of attorney's fees and costs should be reserved for proper application, briefing, and hearing.~~

DONE IN OPEN COURT THIS 27 day of July, 2012.

Hon. Stephanie A. Arend

FILED
DEPT. 12
IN OPEN COURT
JUL 27 2012
Pierce County Clerk
By DEPUTY

Approved as to Form

11132
Attorney for Plaintiff

23412
Attorney for Defendants

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Appendix C

08-2-10045-1 38932576 OR 07-30-12

FILED
DEPT. 12
IN OPEN COURT
JUL 27 2012
Pierce County Clerk
By DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

NORTHWEST CASCADE INC , Plaintiff(s) , vs. UNIQUE CONSTRUCTION INC, Defendant(s) .	Cause No: 08-2-10045-1 **ORDER** on Attorney's **(OR)** Fees

The Court incorporates by reference its letter ruling of June 25, 2012, except as modified in its ORL ruling of July 27, 2012 and reflected in the Judgment entered on July 27, 2012.

DATED this 27 day of July, 2012.

JUDGE STEPHANIE A. AREND

Attorney for Plaintiff/Petitioner
WSBA# 11132

Attorney for Defendant/Respondent
WSBA# 23412

08-2-10045-1 38827931 CTD 07-10-12

SUPERIOR COURT
OF THE
STATE OF WASHINGTON
FOR PIERCE COUNTY

STEPHANIE A. AREND, JUDGE
Dan Vessels Jr. *Judicial Assistant*
Jan-Marie Glaze, Court Reporter
DEPARTMENT 12
(253) 798-7562

334 COUNTY-CITY BUILDING
930 TACOMA AVENUE SOUTH
TACOMA, WA 98402-2108

JUNE 25, 2012

Mr. Michael Murphy
300 E Pine St
Seattle, WA 98122-2029

Mr. Martin Burns
3906 S 74th St
Tacoma, WA 98409-1001

RE: Northwest Cascade, Inc. v. Unique Construction, Inc., et. al.
Pierce County Cause No. 08-2-10045-1

Dear Counsel:

This matter was before the Court on a bifurcated trial. After the jury returned a verdict on March 23, the Court ruled on Plaintiff's request to pierce the corporate veil on March 29. Subsequently, the parties submitted proposed findings of fact and conclusions of law, and the Court issued an oral ruling on April 27. At the conclusion of that ruling, the Court requested further information on a few of the findings of fact and conclusions of law. That was subsequently provided.

The Court held that the amount awarded to Plaintiff by the jury was a liquidated sum and it was readily determinable without reliance on opinion or discretion. The Court awarded Plaintiff prejudgment interest.

The Court also heard argument on both parties' requests for attorney's fees, but had not received all the pleadings touching upon that issue. The Court has now received and reviewed those pleadings and submits this letter as its decision on these remaining issues.

Counsel for Plaintiff Northwest Cascade, Inc., shall prepare final findings of fact and conclusions of law, based in part on my oral rulings of April 27, 2012, and including the following:

Findings of Fact

34. The Rehes lived in the 89th Street Property rent free for the entire period from 2005 through the date of trial, except for an unspecified 18 month period during which

they did not live in the 89th Street Property. Loan application documents showed that the Rehes proposed to use the 89th Street Property as collateral for a personal line of credit with Bank of America in January 2007 (Ex. 83), but there was no evidence presented that a deed of trust or mortgage was ever recorded securing the Bank of America personal line of credit with the 89th Street Property.

35. There was no interest accrued or paid to the Rehes for loans to Unique. There were no documents reflecting any shareholder loans to Unique, and no such loans were reflected on the Rehe tax returns. There were no payments to the Rehe's for the use of any contributed capital. Mr. Rehe treated his corporate and personal assets as one and the same. Mr. Rehe commingled the assets because in his mind all of the assets belonged to him.

36. [omitted in its entirety]

42. Mr. Rehe's accounting practices were substandard. He incorrectly viewed the S-Corporation as a "flow through" entity and that meticulous formalities were not needed. While Mr. Rehe's accounting practices are substandard, they were not designed to intentionally evade a duty to a creditor.

45. It was not the manner in which Mr. Rehe kept books or the commingling of personal and corporate funds that harmed Northwest Cascade.

46. The assets that Northwest Cascade is trying to reach were never a consideration of Northwest Cascade when entering into the contract. The attempts to pierce the corporate veil is an attempt by Northwest Cascade to create a fund against which to collect a judgment.

47. Prior to entering into the contract, Northwest Cascade did not ask to see the books or financial records of Unique or the Rehes. Therefore, the abuse of the corporate form by commingling and the Rehe's personal use of corporate assets did not mislead Northwest Cascade.

48. [omitted in its entirety]

Conclusions of Law

5. The commingling of personal and corporate funds and lack of adequate records were not designed to defraud, manipulate, or misrepresent the corporate status. The substandard accounting procedures of Unique Construction in this case do not, standing alone, support disregarding the corporate form because it was not done fraudulently or with the intent to defraud.

Attorneys' Fees

Both Plaintiff and Defendants have requested attorneys fees. To properly analyze these requests, an understanding of the procedural history of this case is necessary.

Procedural History

This case was commenced with the filing of the Complaint on July 7, 2008. At that time, Plaintiff named only one defendant: Unique Construction. Plaintiff alleged two causes of action against Unique Construction: Breach of Contract and Unjust Enrichment.

On October 30, 2009, Plaintiff filed its First Amended Complaint for Breach of Contract, adding Temporal Funding, LLC and William Rehe and Jane Doe Rehe as defendants. Plaintiff reasserted its claims for Breach of Contract and Unjust Enrichment, and added Veil Piercing/Alter Ego and Uniform Fraudulent Transfer Act.

Defendant Unique Construction filed a counterclaim requesting lost profits and other consequential damages. This counterclaim was dismissed by Order Granting Motion for Partial Summary Judgment on March 12, 2010. The Court acknowledged that Plaintiff was entitled to an award of its reasonable costs and attorneys fees but reserved on calculating an amount until "the termination of this litigation, based upon respective rights in the contract."

On April 27, 2011, Plaintiff filed its Second Amended Complaint for Breach of Contract, adding the William K and Marion L LLLP as a defendant. No additional causes of action were asserted.

On August 16, 2011, Plaintiff filed its Third Amended Complaint for Breach of Contract, adding Sahara Enterprises, LLC, as a defendant. No additional causes of action were asserted.

On November 4, 2011, the parties appeared before Judge Grant on Plaintiff's Motion for Default against Sahara Enterprises and Plaintiff's Motion for Sanctions. The Court denied the Motion for Default and reserved ruling on the Motion for Sanctions until trial.

On the morning of trial, Plaintiff moved for a voluntary dismissal of Temporal Funding, LLC. On March 15, 2012, an Order Granting Plaintiff's Motion to Dismiss Temporal Funding, LLC was entered.

The jury returned a verdict in favor of the Plaintiff against Defendant Unique Construction on the Breach of Contract claim; awarding Plaintiff contract damages of $139,075.75. The jury found that the transfer of the 89th Street Court property from Unique Construction to Black Point Management, LLC, was with the actual intent to hinder, delay or defraud creditors, without receiving reasonably equivalent value, leaving Unique Construction insolvent. The jury found that the transfer of Mr. Rehe's stock portfolio to the William K and Marion L LLLP was made with actual intent to

defraud creditors, without receiving reasonably equivalent value, leaving the Rehes to incur debts beyond their ability to pay as they came due.

Following the jury verdict, the Court was asked to decide, as a matter of law, that William and Suzanne Rehe were personally liable for the judgment against Unique Construction under the theory of Piercing the Corporate Veil. After analyzing the factors, the Court held that Plaintiff did not meet its burden for the Court to pierce the corporate veil.

Plaintiff is the prevailing party on the breach of contract claim against Unique Construction, and on the uniform fraudulent transfer claim against Sahara Enterprises, LLC, and on the uniform fraudulent transfer claim against the William K and Marion L LLLP. Defendants William and Suzanne Rehe are the prevailing parties on the piercing the corporate veil claim. Neither Plaintiff nor Defendant Temporal Funding is a prevailing party as the Plaintiff voluntarily dismissed Temporal Funding without prejudice prior to trial.

The Contract between Northwest Cascade and Unique Construction allowed for an award of attorneys fees to the prevailing party in litigation. RCW 4.84.330 mandates the award of fees to the prevailing party, with no discretion except as to the amount. The prevailing party for the purposes of a contractual provision for an award of attorneys fees is usually one who receives judgment in his or her favor.

Plaintiff has requested attorneys fees of $237,924.54 against Unique Construction on the Breach of Contract Claim; and $98,191.08 against Unique Construction and William and Suzanne Rehe for the fraudulent transfer of the 89th Street Court property. Plaintiff does not request attorneys fees against Sahara Enterprises, LLC or against the William K and Marion L LLLP. Plaintiff requests sanctions against Defendant William Rehe in the amount of $25,000. Plaintiff has further requested $13,994.37 in costs. Defendants William Rehe, Suzanne Rehe, and the William K and Marion L LLLP request attorneys fees against Plaintiff in the amount of $128,963.41 and costs in the amount of $6,453.79.

Analysis

The reasonableness of a claim for attorneys fees depends on the circumstances of each case. *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). The court should consider the amount of time expended, the difficulty of the questions involved, and the skills required. A trial court may calculate its award of attorney fees in proportion to the time spent on successful issues of the case as tried. *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 772-73, 115 P.3d 349 (2005).

In the absence of a predetermined method set forth in the contract itself, the proper method for the calculation of a reasonable fee award is the lodestar method. *Id.* at 773. The lodestar approach sets fees by multiplying a reasonable hourly rate by the

reasonable number of hours spent on the lawsuit. This method dictates that attorneys fees are calculated by establishing a lodestar fee and then adjusting it up or down based on other external factors.

Hourly Rates. The presumptive reasonable hourly rate for an attorney is the rate the attorney charges. In this case, both parties have submitted undisputed evidence of their reasonable hourly rates. There was no evidence offered to suggest that the rates charged by either counsel were unreasonable. I find that the hourly rates charged by the lawyers in this case, including the hourly rates charged by other attorneys and staff in their offices who worked on this matter, are reasonable.

Amount of Time and Costs Expended. The evidence submitted specifically sets forth the tasks that were performed, the time spent on the tasks, who performed the tasks and the rates charged by that attorney or staff member at the time the work was performed. The costs incurred were specifically detailed and explained, including amounts, dates of expenses and the identity of the persons or entities paid. Both Plaintiff and Defendants provided reasonable and detailed records that the Court has independently reviewed and evaluated.

Plaintiff's counsel has billed nearly $400,000 in attorney fees on a contract claim for $139,075.75. "While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993).

Plaintiff posits that the claims are "inextricably intertwined" such that the segregation of the actual hours spent on the different claims is difficult. Plaintiff asks the Court to instead use the amount of time at trial that witnesses spent testifying as to each claim. Defendants agree that the claims are inextricably intertwined, but suggest that the Court should look to the entire four year history of this case instead of just the time spent in trial. "The determination of the fee award should not become an unduly burdensome proceeding for the court or by the parties." *Absher Construction Co. v. Kent School District*, 79 Wn. App. 841, 917 P.2d 1086 (1996).

An award of attorneys' fees in this case cannot be determined with mathematical precision. If the Court looks only to the time used at trial, it necessarily ignores the amount of pretrial work pursuing a claim against a defendant (Temporal Funding) that was dismissed on the morning of trial. No party remaining in this case should be awarded fees or costs associated with Plaintiff's claim against Temporal Funding or Temporal Funding's defense. Since the actual time spent on pursuing this defendant cannot be segregated from the time spent pursuing the other two defendants on this same claim, the Court will discount fees requested on the Uniform Fraudulent Transfer Act Claim by one third.

Moreover, the primary claim in this action was the breach of contract claim against Unique Construction, which claim was asserted in the original complaint. This claim was relatively straight forward. If this case had proceeded to trial on only this single issue, the trial would have been very short and attorneys' fees both in discovery, pretrial and trial would have been significantly less than what was ultimately incurred.

In contrast, the claim for UFTA against Sahara Enterprises was not asserted until the Third Amended Complaint was filed on August 16, 2011, over three years after the original Complaint was first filed. By that time, Plaintiff had already incurred attorney fees of $147,158.50. To nevertheless award Plaintiff a percentage of all attorneys' fees incurred based on how much time was devoted at trial to this issue ignores this reality. The Court is mindful, however, that a considerable amount of time at trial was devoted to the uniform fraudulent transfer act claims, including time to prepare jury instructions and a verdict form (in the absence of pattern instructions on the Uniform Fraudulent Transfer Act).

Based on the foregoing, the Court finds the following to be reasonable attorneys' fees:

In favor of Plaintiff against Unique Construction on the Breach of Contract claim, $237,924.54; in favor of Plaintiff against Unique Construction on the Uniform Fraudulent Transfer Claim, $32,730.36; in favor of Defendants William and Suzanne Rehe against Plaintiff on Piercing the Corporate Veil, $128,963.41.[1]

The Court does not find an appropriate basis to impose sanctions against Mr. William Rehe.

This matter needs to be placed on the Court's docket for presentation of the Findings of Fact and Conclusions of Law and Judgment. Please contact the Court's judicial assistant, Dan Vessels Jr., to arrange an appropriate time.

Respectfully,

Stephanie A. Arend

[1] In his Declaration, Mr. Burns asserts that he attempted to segregate out fees related to unsuccessful claims and only request fees relating to the successful defense of piercing the corporate veil. The amount requested by Defendants William and Suzanne Rehe as the prevailing party on this claim is less than 11 percent of Plaintiff's total attorney fees. Since Plaintiff asserts that 11 percent of the trial time was devoted to this issue, the Court finds this amount to be reasonable.